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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. —

THE UNITED STATES OF AMERICA, PETITIONER

v.

FIVE PARCELS OF LAND IN HARRIS COUNTY, TEXAS, AND HOUSTON DEEPWATER LAND COMPANY, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment entered in this case on February 16, 1950, by the United States Court of Appeals for the Fifth Circuit.

OPINION BELOW

The opinions of the Court of Appeals (R. 363-369) are reported at 180 F. 2d 75.

JURISDICTION

The judgment of the Court of Appeals was entered on February 16, 1950 (R. 369). The jurisdiction of this Court is invoked under 28 U. S. C. sec. 1254.

QUESTION PRESENTED

Whether, when it condemns lands, the United States must pay the owner for an enhancement in value resulting from expenditures made by the Government prior to the institution of condemnation proceedings, and while the lands were under lease to the Government or its agents, to improve such lands.

STATEMENT

By two contracts entered into on January 11, 1941 (R. 236-273) and April 9, 1941 (R. 274-305) between the United States and the Houston Shipbuilding Corporation, the latter undertook to lease from their owners certain lands and construct thereon a shipyard. The United States agreed to bear the entire cost of the project (R. 244-245, 284-285). The contracts specified that the United States would retain title to structures, even though attached to the realty (R. 246-247, 287), and required the Shipbuilding Corporation to procure leases that would safeguard the Government's title (R. 262, 304).

Pursuant to these contracts, the Shipbuilding Corporation obtained leases to the lands condemned in these proceedings. On February 15, 1941, respondent Harris County Houston Ship Channel Navigation District leased to the Shipbuilding Corporation Parcel No. 1, which contained 84.636 acres (R. 309-322). On the same date, respondent Houston Deepwater Land Company leased to it Parcel No. 2, containing 31 acres (R. 192-205) and

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Parcel No. 3, containing 22.03 acres (R. 212-216). These three leases were to end on February 14, 1946 (R. 310, 193, 213) but the lessee could extend them for an additional five years (R. 313, 198). On April 15, 1941, respondent Land Company leased to the Shipbuilding Corporation Parcel No. 4, comprising 73.875 acres (R. 218-224) and on April 15, 1942, Parcel No. 5, a 95.1 tract (R. 226-234). Like the three earlier leases, these were to expire on February 14, 1946, unless extended. In each instance the lessor agreed with the lessee, "but for the benefit of the Government," that the latter had title to all structures (R. 316, 201, 215, 223, 232).

On November 14, 1942, while the lands were being occupied under the leases by the Shipbuilding Corporation, the United States instituted proceedings to condemn them (R. 13-18) and obtained orders giving it immediate possession (R. 19-22). Thereafter, it filed a declaration of taking and deposited its estimate of just compensation (R. 25-40), and obtained a judgment that it had title (R. 45-49).

In view of the explicit provision in the leases that the lessee had title to all improvements, respondents did not claim that they were entitled to recover the value of such improvements. But they did contend they should be awarded the present value of the lands as enhanced by dredging, filling and leveling done at the Government's expense. The United States took the position, how-

ever, that it could not be compelled to pay for such enhancement in value since it resulted from the Government's own expenditures.

Before deciding the issue, the trial judge asked the jury to find as to each parcel its value (1) on the date it was leased, (2) on the date of taking but excluding all improvements made by the Government, and (3) and on the latter date including only the improvements resulting from the dredging, leveling and filling done by the United States. As to each parcel, the jury found that, excluding improvements made by the Government, the value had not changed between the date it was leased and the date it was condemned, but that between these dates, because of the improvements by dredging, filling and leveling done by the United States, each parcel had increased in value, and that all five parcels, otherwise worth $387,800.60, had increased in value to $720,097.15 (R. 132-139).

Upholding respondents' contentions, the trial court entered judgments for the larger amounts (R. 131-159, 160-169). The Court of Appeals for the Fifth Circuit, with Judge McCord dissenting, affirmed (R. 369).

REASONS FOR GRANTING THE WRIT

1. In *United States* v. *Commodities Trading Corporation*, Nos. 156, 163, decided March 27, 1950, this Court held that, in all cases raising questions as to the measure of "just compensation", the "dominant consideration always remains the same: What

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compensation is 'just' both to an owner whose property is taken and to the public that must pay the bill?" The Court went on to say that "The word 'just' in the Fifth Amendment evokes ideas of 'fairness' and 'equity' * * *." (Slip opinion, p. 2.) In this case, the United States, as lessee, expended several hundred thousand dollars to dredge, fill, and level the lands which it subsequently condemned. The leases neither imposed upon the Government an obligation to make such expenditures nor provided that, if such expenditures were made, the lessors were entitled to benefit thereby. The court below, nevertheless, has held that the United States must pay the lessors the enhanced value to the lands resulting from its own expenditures. The result is that the Government has been compelled to pay twice for having these lands improved.

This is not a case in which there was an understanding, express or implied, between the Government and the lessors that the improvements would be made as a *quid pro quo* for a reduced rental. Contrary to the statement made in the majority opinion of the Court of Appeals (R. 366), there is no evidence whatsoever in the record to support the conclusion that it was "within the intent, purpose, and contemplation of the parties to the leases" that the Government would improve these properties by dredging, filling, and leveling. And there is no provision in the leases which warrants the

statement of the majority below that "the right to receive the lands back with the improvements *to* the lands as distinguished from improvements *on* the lands was a right implied in the leases that inheres in the land-owners." (Ibid.)

To be sure, if the Government had not condemned these lands, in all probability they would have been returned to the owners, at the expiration of the leases, in their improved condition. As the court below said, it is "fantastic and unthinkable" that the United States "would spend large sums of the taxpayers' money to disimprove, or unfill, or unlevel the lands upon the termination of the lease" (R. 366). But merely because the United States probably would not take steps to restore the lands to their original and less valuable condition should not obscure the fact that the improvements would constitute a windfall to the lessors—improvements which the United States was under no obligation to make. The decisive consideration is that these lands were enhanced in value as a result of expenditures which the Government was not obliged by the leases to make, and that these improvements were made solely for the benefit of the Government, *i.e.*, to promote the object for which the lands were leased, the construction of ships. Clearly, if any governmental purpose would have been served by a subsequent alteration or destruction of these improvements, the Government could have proceeded without violating any provision of the leases, and

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without regard to the effect on the value of the lands or the wishes of the lessors.

In holding that the Constitution requires such a windfall to the lessors, and in subjecting the United States to a double liability for the cost of the improvements, the court below has applied a rule of just compensation which appears neither fair nor equitable, and which is in conflict with the rulings of this Court that the Constitution does not require a condemnor to pay for an increase in value which it has voluntarily created. *Searl* v. *School District, Lake County*, 133 U. S. 553; *Consol. Turnpike* v. *Norfolk &c Ry. Co.*, 228 U. S. 596, 602; *United States* v. *Miller*, 317 U. S. 369, 377; *United States* v. *Cors*, 337 U. S. 325, 331-334.[1]

2. It is important that the question here presented be authoritatively decided, both as a precedent to be followed by the lower courts in deciding similar cases and as a guide to Government officials in the leasing and administration of federal prop-

[1] Typical of a host of decisions of other courts to the same effect are the following: *Lyon* v. *The Green Bay & Minnesota R'y Co.*, 42 Wis. 538, 544-545; *Morgan's Appeal*, 39 Mich. 675, 679-680; *Greve* v. *First Div. St. Paul & Pac. R. Co.*, 26 Minn. 66, 70; *Jones* v. *N. O. & S. R. R. Co.*, 70 Ala. 227, 233-234; *Louisville, N. O. & T. R. R. Co.* v. *Dickson*, 63 Miss. 380, 385; *Preston* v. *Railway*, 70 Tex. 375; *St. Johnsbury Railroad Co.* v. *Willard*, 61 Vt. 134, 137; *Jacksonville, T. & K. W. Ry. Co.* v. *Adams*, 28 Fla. 631, 638; *Chase* v. *Jemmett*, 8 Utah 231; *Charleston Railway Co.* v. *Hughes*, 105 Ga. 1, 15-18; *United States* v. *Smith*, 110 Fed. 338, 340 (E.D. N.Y.); *Norfolk & O. V. Ry. Co.* v. *Turnpike Co.*, 111 Va. 131, 140, *et seq.*; *Bear Gulch Placer Mining Co.* v. *Walsh*, 198 Fed. 351, 355 (D. Mont.); *New York, O. & W. Ry. Co.* v. *Livingston*, 238 N.Y. 300, 304, *et seq.* So far as is known, there is no authority to the contrary.

erties. The extent to which the United States is required by the Fifth Amendment to compensate a private owner for enhancement of value resulting from improvements voluntarily made by the Government as lessee, where the lease neither obligates the Government to make such improvements nor gives the lessor the benefit of any improvements voluntarily made, raises questions which are intrinsically important. In recent years, particularly since the inception of World War II, the Government has with increasing frequency found it necessary to condemn lands which it has improved under leases or similar arrangements. Hence the question here presented will probably recur constantly. Indeed, a similar case is now pending in the court below in which further proceedings have been suspended awaiting the outcome of this case. In these circumstances, the Government respectfully submits that the issue raised warrants authoritative determination by this Court.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

PHILIP B. PERLMAN,
Solicitor General.

MAY 1950.

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Supreme Court, U.S.
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No. 68

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

THE UNITED STATES OF AMERICA, *Petitioner*
v.
FIVE PARCELS OF LAND IN HARRIS COUNTY, TEXAS, AND HOUSTON DEEPWATER LAND COMPANY, ET AL.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENT, HARRIS COUNTY HOUSTON SHIP CHANNEL NAVIGATION DISTRICT IN OPPOSITION

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[redacted] CO., HOUSTON

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No. 816

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

THE UNITED STATES OF AMERICA, *Petitioner*
v.
FIVE PARCELS OF LAND IN HARRIS COUNTY, TEXAS, AND HOUSTON DEEPWATER LAND COMPANY, ET AL.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF FOR RESPONDENT, HARRIS COUNTY HOUSTON SHIP CHANNEL NAVIGATION DISTRICT IN OPPOSITION

Opinions Below

The opinions of the Court of Appeals (R. 363-369) are reported at 180 F.2d 75.

Jurisdiction

The judgment of the Court of Appeals was entered on February 16, 1950. The petition for a writ of certiorari was filed on May 10, 1950. The jurisdiction of this Court is invoked under 28 U. S. C. 1254.

Question Presented

Whether the landowner in condemnation proceedings by the United States is entitled to compensation for the increased value to the land caused by dredging, filling and leveling of same by the United States, while the lands were under lease to it or its agents, prior to the institution of condemnation proceedings.

Statement

For the purpose of constructing and operating a shipyard, the United States, through its agent, Houston Shipbuilding Corporation, leased the lands necessary for the project from respondents beginning early in 1941 (R. 309-322; 192-206; 212-216; 218-224; 226-233). This respondent, a tax-supported subdivision of the State of Texas (R. 65-69) leased Irish Bend Island and adjacent land (Parcel No. 1 consisting of 84.636 acres) contiguous to the Houston Ship Channel to the Federal agency on February 15, 1941, (R. 321) for a stipulated rental insufficient to cover the expense of the lease (R. 338), the principal consideration moving to this respondent being anticipated benefits to it by reason of the improvement of the property and "the return of the property with its improved topography, resulting from dredging, filling and leveling, as the sole net benefit to the said Navigation District" (R. 341).

The lease was for a primary period of five years, with right of renewal in the lessee for an additional five years, and gave the United States the right to remove structural improvements and facilities at the

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expiration of the term, even if attached to the land (R. 310-312). The lease provided (R. 320): "it is contemplated that the Lessee shall conduct certain dredging operations in the old bed of Buffalo Bayou and between Irish Bend Island and the main channel of the Houston Ship Channel and, further, that spoil from such dredging operation will, to the extent required to carry out Lessee's plans, be spilled on Irish Bend Island . . . "

After execution of the lease, the United States, as contemplated in the lease, carried out the dredging, filling and leveling of the land necessary to the erection of the shipyard, and after completion of the dredging, filling and leveling, entered condemnation proceedings (R. 306).

Respondents made no claim for compensation for any of the structural improvements or facilities, which, under the lease, were removable by the United States, and have been awarded none. They have claimed, and have been awarded the value of the land alone, at the time of condemnation, in its altered shape and topography and increased value, by reason of the dredging, filling and leveling.

Argument

Throughout this controversy, it has been contended in behalf of the United States that the terms and provisions of the lease contracts should be ignored, and that the question presented should be determined on the basis of asserted "unjust enrichment" of the landowner at the expense of the condemnor.

At the date of condemnation, the dredging, filling and leveling had been completed (R. 306). Petitioner admits that its purpose in obtaining the leases was to erect a shipyard on the land (Petition, page 2). However, it asserts that the United States was "under no obligation to make" the improvements (Petition, page 6). Just how the shipyard was to be erected without the dredging, filling and leveling of the land, petitioner does not say. Nor does it deny that it was done as a necessary part of the project. The effect and result of the dredging, filling and leveling of the land was a definite physical alteration of its shape, configuration and topography, but it remained and has always been the same land—the same dirt, soil and earth—at the time of the execution of the lease, the date of condemnation, and now. Petitioner makes no claim to the contrary.

Under the terms of the leases, the land, as distinguished from the structural improvements, reverted on expiration of the leases, to the lessors, and petitioner does not assert otherwise. In fact, petitioner admits (Petition, page 6) that "if the Government had not condemned these lands, in all probability they would have been returned to the owners, at the expiration of the leases, in their improved condition."

The situation here presented is a typical instance of condemnation of land under existing lease. The settled applicable rule, ignored by petitioner, is that requiring apportionment of compensation between the lessor and lessee according to their respective interests: the lessor, for his reversionary interest, and

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the lessee, for the leasehold interest. This rule is recognized in virtually all American juridictions, some of the leading decisions applying it being: *Cornell-Andrews Smelting Co. v. Boston and P. R. Corporation* (Sup. Jud. Ct. of Mass., 1913) 215 Mass. 381, 102 N. E. 625; *Ft. Worth & D. S. P. Ry. Co. v. Judd* (Tex. Civ. App., 1938, w/e dism.) 4 S. W. 2d 1032; *United States of America v. Galigher Co.* (U. S. Sup. Ct., 1945) 66 Sup. Ct. 813, 327 U. S. 372, 90 L. Ed. 729; *City of St. Louis v. Senter Commission Company* (Mo. Ct. of App., 1937) 108 S. W. 2d 1070; *Mayor, etc. of City of Baltimore v. Latrobe* (Ct. of App., Md., 1905) 61 Atl. 203; *Schreiber et al v. Chicago & E. R. Co.* (Sup. Ct. of Illinois, 1885) 115 Ill. 340, 3 N. E. 427; *Pierson et al v. H. R. Leonard Furniture Co.* (Sup. Ct. of Mich., 1934) 256 N. W. 529; *State v. Northern Pac. Ry. Co.* (Sup. Ct. of Mont., 1930) 295 Pac. 257.

The rule requiring that the lessor be compensated for the taking of his reversionary interests and rights is equally applicable when, as here, the lessee in the lease is the condemnor, and has enhanced the value of the land during the lease by changes or alterations in the shape or configuration of the land, by expenditure of its own funds. A decision directly in point, on facts strikingly similar to those here involved is that of the Supreme Court of Appeals of Virginia in *Charles v. Big Sandy & C. R. Co.*, 129 S. E. 384. Other decisions directly holding that the contracts and agreements between lessors and lessees are controlling in determining for what interest the particular lessor is en-

titled to compensation upon condemnation are: *Corrigan et al v. City of Chicago* (Sup. Ct. of Ill., 1893) 33 N. E. 746, 21 L.R.A. 212; *In re Triborough Bridge, City of New York* (Sup. Ct. N. Y., 1937) 293 N.Y.S. 223, affirmed Court of Appeals of New York, 1937, 10 N. E. 2d 561; *Bass v. Metropolitan West Side El. Ry. Co. et al* (Cir. Ct. App., 7th Cir., 1897), 82 Fed. 857; *McAllister v. Reel,* (Mo. Ct. App., 1894) 59 Mo. App. 70.

The decisions cited and relied upon by petitioner do not support the position it has taken in this case. None of them involve a situation where, as here, the reversionary right of the lessor is fixed and defined by the provisions of a lease under which he is entitled to the land at the termination of the lease. Petitioner's authorities fall, in the main, into four categories: First, the situation where the condemnor had leased lands with the right to remove any improvements placed thereon by it; or second, where the condemnor had gone upon the land in good faith and erected improvements, believing it had the right to do so; or third, the situation (typified in *Miller v. U. S.* 317 U. S. 369) where persons acquire land in or "buy into" an area of a project to be undertaken by the Government, with knowledge that the Government intended to acquire the area by purchase or eminent domain proceedings; or fourth, where the condemnor owns the improvements, and should, upon equitable considerations, be given the right to remove them. The holdings of none of those decisions are applicable

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here, where a wholly different situation, governed by the provisions of the lease contract, exists.

In its discussions under "Reasons for Granting the Writ", petitioner makes several incorrect assertions:

(a) "The leases neither imposed upon the Government an obligation to make such expenditures, nor provided that, if such expenditures were made, the lessors were entitled to benefit thereby." (Petition, page 5). As has been pointed out, the whole purpose of the leases was the erection of a shipyard, an indispensable part of the project being the dredging, filling and leveling of the land, which reverted to respondents at termination of the leases.

(b) "This is not a case in which there was an understanding, express or implied, between the Government and the lessors that the improvements would be made as a *quid pro quo* for a reduced rental". (Petition, page 5). As respects this respondent, the precise contrary is true. (R. 338, 340-342).

(c) "There is no evidence whatsoever in the record to support the conclusion that it was 'within the intent, purpose, and contemplation of the parties to the leases' that the Government would improve these properties by dredging, filling and levelling". (Petition, page 5). As has been stated, the lease (R. 320) expressly contemplated these operations and provided for depositing the spoil on respondent's land.

(d) "And there is no provision in the leases which warrants the statement of the majority below that 'the right to receive the lands back with the improve-

ments, *to* the lands as distinguished from improvements *on* the lands, was a right implied in the leases that inheres in the landowners.'" (Petition, pages 5-6). The leases gave the Government the right to remove structural improvements, but the land was to revert to the lessor at termination. (R. 309-326).

Petitioner's argument that had it not condemned the land, it might have spent large sums of money to "unfill, or unlevel" it, or might have otherwise altered it "without regard to the effect on the value of the lands or the wishes of the lessors", (Petition, pages 6-7) is mere conjecture, and cannot affect the rights of the parties as they existed at the time of condemnation.

Petitioner does not contend that the judgment awarded respondent on the jury's verdict was other than conservative, its only point of argument being that the enhancement in value by reason of its operations should not have been allowed. The settled law is contrary to petitioner's contention, however, and there is no aspect of the case to take it out of the operation of the rule applied in the decisions cited above. Nor is there merit in petitioner's assertions that respondent has received a "windfall" and that a possible recurrence of the instant situation requires review by this Court. If further leases of the kind here involved be made, their provisions will govern the rights of the parties, as has always been the rule, and as should always remain the rule.

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Conclusion

The decision of the Court below is clearly correct, and the case does not warrant review by this Court. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted,
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June, 1950.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 68

THE UNITED STATES OF AMERICA, *Petitioner*
v.
FIVE PARCELS OF LAND IN HARRIS COUNTY, TEXAS, AND HOUSTON DEEPWATER LAND COMPANY, ET AL.

BRIEF OF HOUSTON DEEPWATER LAND COMPANY IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 816

THE UNITED STATES OF AMERICA, *Petitioner*

v.

FIVE PARCELS OF LAND IN HARRIS COUNTY, TEXAS, AND HOUSTON DEEPWATER LAND COMPANY, ET AL.

BRIEF OF HOUSTON DEEPWATER LAND COMPANY IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

STATEMENT

There is no showing of any special or important reason why in the exercise of sound judicial discretion this Court should grant the Petition for a Writ of Certiorari. There is no conflict with any decision of this Court and there is no conflict of decisions among the Courts of Appeal for the various circuits. The case presents no new principle of law. On the contrary, the opinion of the Court of Appeals in affirming the judgment of the District Court did not depart from, but in all respects recognized and applied the well settled rules of controlling Federal decisions in condemnation cases.

The judgment was for the value of the land only,

as it physically existed on the date of taking, including any integral part added to the soil by the filling and leveling, and the increment added by reason of the lands' same accessibility to adjacent navigable waters which had been deepened and improved by dredging outside the area of this Respondent's condemned lands. Nothing was awarded for the value of any Government owned property placed on Respondent's leased parcels of land.

As to this Respondent the question presented is not as broad as Petitioner states, but precisely the question is whether Houston Deepwater Land Company is entitled in this condemnation to compensation for the enhanced value of its lands resulting from the filling and leveling of such lands and the dredging of adjacent navigable waters by the United States prior to the institution of the condemnation and while such lands were under lease to the United States or its agent.

ARGUMENT

The Court below correctly states that the judgment entered in favor of this Respondent, Houston Deepwater Land Company, was based upon the value of its condemned parcels of land at the time of taking, excluding therefrom the value of all facilities and improvements constructed or erected upon such lands. Consequently, such decision does not conflict with the decisions of this Court announcing the rule that where a body clothed with the power of eminent domain, in good faith and under a claim of right, enters

upon lands necessary for its public purposes and erects structures upon such land for its own use, that such structures do not in law become a part of the land, and that such body may later condemn the land without being required to pay more than the value of the land without the structures erected upon it.

Petitioner cites and relies upon four decisions of this Court. Such decisions were grounded upon different facts, because in the present case Respondent claimed nothing and was allowed nothing for the value of any structure, machinery, equipment, or improvement which under the leases remained the property of the condemnor even though affixed to the land.

The first case cited by Petitioner is *Searl v. School District, Lake County*, 133 U. S. 553. There the school district had purchased the squatters' rights of the parties in possession of the lots involved, paying the full value of such lots, in reliance upon the advice of counsel that the title it purchased was superior to that of other parties claiming under a patent. After the school house had been built upon said lots and when the title was found defective, the school district instituted condemnation proceedings against the true owner. The value of the lots, both with and without the school house, was stipulated. The owner claimed the right to be compensated for the value of the land with the school house, under the common law principle that whatever is permanently annexed to the soil becomes a part of it, and that the school house on completion became his property. This Court ap-

plied the well recognized exception to the strict common law rule of fixtures and held that the school house was the property of the condemnor and not of the land owner, and that its value could not justly be included in the land owner's compensation.

In *Consolidated Turnpike Company v. Norfolk & O. V. R. R. Co.*, 228 U. S. 596, it was shown that Bayshore Terminal Company had purchased from the Turnpike Company a right of way strip upon which it constructed a line of electric railway and the necessary power houses and stations. The conveyance to the Bayshore Company was subject to two prior mortgages on all property of the Turnpike Company. After the electric line and power houses and station had been erected upon the right of way strip, the Receiver of the Bayshore Terminal Company instituted proceedings to condemn the mortgagee's interest in such strip. The mortgagee contended for the value of such permanent fixtures of the condemnor attached to the land in assessing the value of the land taken. Again this Court applied the same exception to the common law rule of fixtures, and held that the Virginia Court had properly ruled that the public service corporation had the right to enter under the deed of the mortgagor company and later condemn, compensating the mortgagees for the land only.

The third case relied upon by Petitioner is *U. S. v. Miller*, 317 U. S. 369. Such decision is not apposite to the question upon which Petitioner grounds its right to a Writ of Certiorari. This Court there held that the owner of property taken by eminent domain

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for a public use is not entitled to the benefit of any increment of value added to the property taken by reason of a previous condemnation of adjacent lands for a public project, where such public project from the beginning had included the lands later sought to be condemned.

The Miller case makes no pronouncement in conflict with the decision of the Court below. Only in the event this Court should direct that the entire case be brought before it for review would the Miller case be relevant, and then it would control solely because of this Respondent's alternative contention urged in the Courts below that certain of its parcels of land taken by this condemnation were clearly not within the scope of the original shipbuilding project, and so in any event would be entitled to the increment in value found to have been added to them.

The fourth case relied upon by Petitioner is *U. S. v. Cors*, 337 U. S. 325. There is no conflict with the holding in that case, which was a suit under Section 902 of the Merchant Marine Act. The majority opinion followed previous decisions of this Court in applying the rule that any enhancement of value owing to the condemnor's urgent and special need for the property condemned is not to be allowed as a constituent of fair market value at the time of taking, as such enhancement is a holdup value and not a fair market value. The facts of the instant case do not bring it within the rule of the Cors case.

To determine whether there is a conflict with the

rule of any of such cited cases, it is necessary to see what are the facts of the present case.

Petitioner correctly states that by the First Facilities Contract, the Houston Shipbuilding Corporation undertook to lease some of the parcels of land involved in this proceeding and to construct thereon a shipyard. The United States agreed to bear the entire cost of the shipbuilding project. Such contract, as well as the additional facilities contract, specified that the United States retained title to all structures and other property belonging to it and placed on the leased parcels, even though attached to the realty (Petition pp. 2, 3). The leases provided that at their expiration the United States had the right to remove the structures and other property that the United States concededly owned (R. 201).

The contracts clearly distinguished between "facilities" and "real estate." By "facilities" was meant not "land" (R. 237, 249), but property owned by the Government contemplated to be constructed, erected, or installed upon the leased premises (R. 238, 242); property that could be removed (R. 197, 253, 312) and disposed of (R. 253); property that could be depreciated (R. 243); insured (R. 249); and inventoried (R. 253).

The parcels of land owned by Respondent were not "facilities" to which the Government as Lessee had or retained title. They were not property recognized by the leases as that which the Government had the right to remove, as in the case of structures and

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equipment erected upon the land itself. The "land," as distinguished from "facilities," was owned by the Respondent and not by Petitioner, so in paying for the land only, the Petitioner is not paying for its own property.

This fact alone distinguishes the instant case from the fact situations of the Searl-School District case, supra, and similar cases cited by Petitioner as being in conflict.

Another distinguishing fact is that the Government neither had nor retained title to the navigable waters covering the bed of Buffalo Bayou and the Houston Ship Channel. Such waters were not property of Petitioner to which it retained title, were not property erected or installed upon Respondent's leased lands, and were not property which the Government had reserved the right to remove on termination of the leases. Neither this Respondent, as Lessor, nor the Houston Shipbuilding Corporation, as Lessee, could legally have contracted with respect to the removal of public waters.

Petitioner admits that if the Government had not condemned the parcels of land to which this Respondent had fee simple title that in all probability the lands would have been returned to Respondent at the expiration of the leases in their improved condition (Petition p. 6). Unquestionably, upon termination of the leases all of the rights of Petitioner in and to the leased lands would also have terminated, except the right to remove its own property erected

upon such lands. Upon termination of the leases, this Respondent was entitled to get back its lands with Government owned structures removed, but any integral part of the soil added or changed in the filling and leveling of the land itself was not a Government owned facility within the language of the relevant contracts and the intent of the parties.

Petitioner is obligated to pay just compensation only for what it took. Compensation was awarded only for the lands taken. What was taken from Respondent were leveled and filled lands accessible to deep water. Because of the characteristics inherent in such lands, they were at all times adaptable and suitable for all industrial purposes requiring access to deep water. Such frontage upon and accessibility of the lands to the waters of Buffalo Bayou and the Houston Ship Channel was the principal element of value, not only in February 1941 (the date of first lease), but also in November 1942 (the date of order of possession), when the previously existing ship channel had been deepened and extended by dredging operations to the harbor lines of some of the condemned parcels. Undeniably, it was the long continued public improvement of the Houston Ship Channel by dredging prior to February 1941, that gave the City of Houston its rank within the top four ports of the United States, and gave to Respondent's lands and similar lands with such deep water influence, the substantial values of February 1941 and prior dates.

Petitioner asserts that because such leveling and filling of Respondent's lands and the dredging of

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adjacent public navigable waters added to the value, that Respondent is not entitled to such added value because the leases recognize the Government's title to all of its property placed upon the leased lands and the Government's right to remove such property. Petitioner argues that because the Government, without violating any provision of the leases, could have unfilled or unleveled Respondent's lands, and could have destroyed by filling the improved navigability of adjacent public waters, that Respondent should be denied these elements of value existing as a part of the property taken and inherent in the land itself on the date of taking. The Court below thought such contention fantastic.

Not only is the contention fantastic, but it is also without factual basis. By filling and leveling Respondent's lands the Government changed the surface detail and the ground features of the land, but it did not change the ownership of the land. No provision of the leases gave Petitioner the right on their termination to remove the land itself, which was the sole property of Respondent. By filling in the low areas of the parcels or by cutting down and leveling off the high areas, or by depositing and spreading soil or dirt in the general leveling process, the Government did not change the character of the land from realty to personalty. The deposits of earth made and spread upon the land adhered to and became incorporated in and formed a part of the surface of the ground. Such deposits were not made with a view to removal. In fact it is not within the realm of reasonable conjecture

that Petitioner could have removed or restored exactly this same soil or dirt. Such deposits were an integral and indistinguishable part of the soil itself, the soil of the land owned by Respondent, the land to which Government owned facilities were annexed, and the actual land taken by this condemnation.

So it can be said that this case was decided under well settled principles of law. The rules applied by the Court below are in accord with the repeated pronouncements of this Court that just compensation within the meaning of the Fifth Amendment for property taken for public use requires the owner to be put in as good a position pecuniarily as he would have occupied if his property had not been taken, and that the value of private property so taken shall be determined as of the date of taking and with reference to the loss the owner sustains, considering the property in its condition and situation as of the date of taking.

To put Respondent in as good condition pecuniarily as it would have been upon reversion at the termination of the leases requires Petitioner to pay for the elements of value actually existing as a part of the property taken. The right to receive the lands back with the changed topography of the soil inhered in the land owner. This right, together with the fee simple title to the lands, the Government took. It is

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just that it should pay therefor. The compensation awarded is for such value only.

Respectfully submitted,

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